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NO. 460

Supreme Court of the United States

October Term, 1938

I. W. LANE,
Petitioner,

VERSUS

JESS WILSON, JOHN MOSS and
MARION PARKS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE
TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CHARLES A. CHANDLER,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The Petition of I. W. Lane respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved

The controversy herein involves, primarily, the question of the constitutionality of the Oklahoma Registration Law of 1916, the petitioner herein, plaintiff below, contending that said Registration Law is violative of the 14th and 15th Amendments to the Constitution of the United States, and also violative of Section 1 of Article III, of the Constitution of Oklahoma. That part of said registration law especially contested by petitioner is Section 5654, Vol. 1, O. S. 1931, p. 1646, and said statute is set forth in appendix hereto, p. 26. Said Section 1 of Article III of the Oklahoma

Constitution, Vol. 2, O. S. 1931, p. 1406, Sec. 13446, is set forth in the appendix hereto, p. 25.

This action was instituted by this petitioner, as plaintiff, who, on October 27, 1934, filed his petition (R. pp. 1-11) in the United States District Court for the Eastern District of Oklahoma, making proper jurisdictional allegations and seeking \$5,000.00 actual damages, and \$5,000.00 punitive damages, from the defendants, as election officials and county judge, respectively, on account of their having denied said plaintiff the right to register, and to vote, in violation of his rights under the 14th and 15th Amendments to the Constitution of United States, and laws enacted pursuant thereto, as well as under the Constitution of the State of Oklahoma; plaintiff alleging that said defendants were acting pursuant to a conspiracy, and under color of the afore-mentioned Oklahoma Statute, O. S. 1931, Sec. 5654. By said Petition, said plaintiff alleged that said State statute was violative of the 14th and 15th Amendments to the Constitution of United States, violative of R. S. Sec. 2004, and violative of the Constitution of Oklahoma.

At the conclusion of trial in the District Court, as hereinafter appears, upon direction of the trial court, the jury returned a general verdict against plaintiff (R. p. 61), and judgment was entered accordingly (R. pp. 24-26). Upon appeal to the Circuit Court of Appeals for the Tenth Circuit, said judgment was affirmed (R. pp. 93-101).

It appears that prior to the adoption of said registration law of 1916, O. S. 1931, Sec. 5654, a constitutional provision known as the "grandfather clause" was in force and opera-

tion in the State of Oklahoma, same being Section 4a, Article III, of the Oklahoma Constitution, Vol. 2, O. S. 1931, p. 1407, Sec. 13450. Said grandfather clause is set forth in the appendix hereto, p. 25.

By a decision of this Court said grandfather clause was held to be violative of the 15th Article of Amendment to the Federal Constitution, and void. *Guinn v. United States* (1915), 238 U. S. 347, 59 L. ed. 1340. Immediately after said grandfather clause was invalidated, the Legislature of the State of Oklahoma was convened in special session, and it enacted said Registration Law of 1916 (See: note, Sec. 5654, O. S. 1931; Vol. 1, O. S. 1931, p. 1647).

Upon trial to the jury it was proved: That petitioner Lane was a Negro citizen, and in every respect qualified as an elector under the afore-mentioned Section 1, Article III of the Constitution of Oklahoma (R. pp. 27-29); that he had voted prior to 1914, but was unable to vote in 1914 because of the operation of the grandfather clause (R. p. 28); and that in 1916 the Registration Law here involved was in effect, under which plaintiff could not register (R. p. 28); that plaintiff tried to register during every election year, but was unable to get registered (R. pp. 27, 28); that during the registration period of 1934, petitioner and other Negro citizens, qualified as electors, made application to the respondent said Marion Parks, precinct registrar, for registration and that said registrar refused to register any of said Negroes for the reason, as stated by Parks, "Well, I was instructed by the higher-ups not to register any colored people.". That Parks stated that the "higher-ups" were Jess Wilson, County Registrar, and John Moss, County Judge (R. p. 29).

Upon trial it was also established (R. p. 38) that according to the last Federal Census, that of 1930, the total population of Wagoner County was 22,428, of whom 6,753 were Negroes; and that in several townships in said County the Negro population predominated. It was further established (R. p. 36) that during 20 years next preceding trial in the lower court, there were registered in Wagoner County only two Negro electors. Further, in 1934, during the registration period of which Lane is especially complaining, there were registered in said County, by the precinct registrar appointed by the respondent Jess Wilson, County Registrar, 50 Negro electors, but that at a hearing instigated by the respondent John Moss, then County Judge, the names of all of said 50 Negroes were stricken from the registration record (R. p. 36). It appears further from the record (R. pp. 72-74) that at the hearing at which said names of Negro electors were stricken, said Negro electors were not given a fair trial, nor were they permitted to have counsel in the court room during said hearing, nor were they permitted to cross-examine opposing witnesses (R. pp. 72-74). It was further proved that the other defendants, in denying registration to plaintiff and other Negroes and in striking from the register the names of Negroes who were registered, were acting under instructions given by respondent John Moss, then County Judge (R. pp. 47-49, 72).

At the conclusion of the evidence, the plaintiff, in proper written form, requested the trial court to instruct the jury:

That if plaintiff Lane possessed the qualifications of an elector provided by Sec. 1 of Article III of Oklahoma Con-

stitution, and made application to the registrar for registration, said Lane was entitled under the Constitution and laws of Oklahoma to be registered (Request No. 2, R. pp. 52-53);

That said Oklahoma Statute, Sec. 5654, O. S. 1931, was violative of the 14th Amendment to the United States Constitution, and violative of R. S. Sec. 1979 (Request No. 3, R. pp. 53-54);

That said Section 5654, O. S. 1931, was violative of the 15th Article of Amendment to the Federal Constitution, and violative of R. S. Sec. 2004, Sec. 31, Chap. 3, Title 8, U. S. Code (Request No. 4, R. pp. 55-56);

And plaintiff also requested the court to instruct the jury upon the issue of conspiracy (Request No. 5, R. pp. 56-57).

The trial court refused to give any of said requested instructions, allowed said plaintiff exceptions, and thereupon instructed the jury to return a general verdict for the defendants (R. p. 61). Such verdict was duly returned and entered (R. p. 61), and thereupon judgment was entered in favor of defendants, and against plaintiff (R. pp. 24-26). The opinion of the trial court was dictated into the record (R. pp. 59-61), but does not appear to have been reported.

The cause was duly appealed to the United States Circuit Court of Appeals for the Tenth Circuit, petitioner, as appellant, assigning as errors the alleged errors herein complained of (R. pp. 79-82). By its decision, rendered September 19, 1938, said Circuit Court of Appeals affirmed the judgment of the trial court (R. pp. 93-101).

B.

Reasons Relied Upon for Allowance of Writ

1. It appears from the face of said Oklahoma Registration Law, Sec. 5654, O. S. 1931 (Appendix hereto, p. 26), as well as from the operation of said law as disclosed by the record herein, that said law is, in legal and constitutional contemplation, identical with the original grandfather clause; and that the opinion of the Supreme Court of the United States rendered in the case of *Guinn v. United States* (1915), 238 U. S. 347, 59 L. ed. 1340, holding said grandfather clause to be unconstitutional, was apposite to the issue and binding upon the Circuit Court of Appeals; and it appears further that the opinion of said Circuit Court of Appeals for the Tenth Circuit, holding said Oklahoma Registration Statute to be constitutional, wholly ignored said opinion of this Court in said *Guinn* case, and decided an important federal question in a way clearly in conflict with said applicable decision of this Supreme Court of the United States.

2. It was charged in the petition of plaintiff, and duly established upon trial, that said registration law of Oklahoma, Section 5654, O. S. 1931, as well as its administration, denied to plaintiff the equal protection of the law, in violation of the 14th Article of Amendment to the Constitution of United States; said Circuit Court of Appeals affirmed the judgment of the trial court, and held said statute to be constitutional, without in anywise passing upon said issue so made under the 14th Amendment, and in so doing; so far departed from the accepted and usual course of judicial pro-

ceedings as to call for an exercise of this Court's power of supervision.

3. It appears that there was properly assigned in the Circuit Court of Appeals the alleged error of the trial court in ruling adversely to alleged rights of petitioner under Section 1 of Article III; of the Oklahoma Constitution; and that the Circuit Court of Appeals affirmed said judgment of the trial court, without in anywise passing upon said State or local question, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. It appears that in the trial court ample evidence was introduced to establish a *prima facie* case on behalf of plaintiff, and that in the Circuit Court of Appeals appellant alleged as error the instruction by the trial court of a general verdict for the defendants; and, further, that the Circuit Court of Appeals affirmed said judgment, without in anywise passing upon said alleged error, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

C.

Prayer for Writ of Certiorari

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to

certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 1635, I. W. Lane, Appellant, vs. Jess Wilson, John Moss, and Marion Parks, Appellees; and that said decree of said United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper; and your petitioner will ever pray.

I. W. LANE, Petitioner,
By CHARLES A. CHANDLER,
Counsel for Petitioner.

NO.....

In the Supreme Court of the United States
October Term, 1938

I. W. LANE,
Petitioner,

VERSUS

JESS WILSON, JOHN MOSS and
MARION PARKS,
Respondents.

**BRIEF OF PETITIONER IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

I.

OPINIONS OF THE COURTS BELOW

The decree of the trial court was entered on the 9th day of June, 1937 (R. pp. 24-26). The trial court did not render a formal opinion, but orally dictated into the record the basis of its decree (R. pp. 58, 59-62). This opinion was not reported.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the trial court, was rendered on the 19th day of September, 1938 (R. pp. 93-101). Said opinion of said Circuit Court of Appeals is reported in the....., 1938, Federal Reporter, Advance Sheet, ... Fed. (2d) at pages..... (unreported at date hereof).

II.

JURISDICTION

This action arose under the 14th and 15th Amendments to the Constitution of the United States, and under R. S., Secs. 2004, 1979 (Title 8, U. S. C., Secs. 31, 43), and under the 14th subdivision of Sec. 41, Title 28, U. S. C. (R. S., Sec. 563, par. 12; Sec. 629, par. 16; March 3, 1911, c. 231, Sec. 24, par. 14, 36 Stat. 1092); and it was within the jurisdiction of the District Court.

Upon appeal to the United States Circuit Court of Appeals for the Tenth Circuit, that court properly acquired jurisdiction. Act of Feb. 13, 1925, Chap. 229, 43 Stat. 936, 1st subdivision of Sec. 128, Judicial Code.

The jurisdiction of this Supreme Court of United States is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb. 13, 1925, 43 Stat. 938; and under Rule 38 of this Court.

III.

STATEMENT OF THE CASE

A sufficient statement of the case has been given herein under the heading "A" in the preceding Petition for Writ of Certiorari, pp. 1-5, and, in the interest of brevity, said statement is here referred to but not repeated at this point.

IV.

SPECIFICATION OF ERRORS

I.

It appears from the face of said Oklahoma Registration Law, Sec. 5654, O. S. 1931 (Appenfix hereto, p. 26), as well as from the operation of said law as disclosed by the record

herein, that said law is, in legal and constitutional contemplation, identical with the original grandfather clause; and that the opinion of the Supreme Court of the United States rendered in the case of *Guinn v. United States* (1915), 238 U. S. 347, 59 L. ed. 1340, holding said grandfather clause to be unconstitutional, was apposite to the issue and binding upon the Circuit Court of Appeals; and it appears further that the opinion of said Circuit Court of Appeals for the Tenth Circuit, holding said Oklahoma Registration Statute to be constitutional, wholly ignored said opinion of this court in said *Guinn* case, and decided an important federal question in a way clearly in conflict with said applicable decision of this Supreme Court of the United States.

II.

It was charged in the petition of plaintiff, and duly established upon trial, that said registration law of Oklahoma, Section 5654, O. S. 1931, as well as its administration, denied to plaintiff the equal protection of the law, in violation of the 14th Article of Amendment to the Constitution of United States; said Circuit Court of Appeals affirmed the judgment of the trial court, and held said statute to be constitutional, without in anywise passing upon said issue so made under the 14th Amendment, and in so doing, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

It appears that there was properly assigned in the Circuit Court of Appeals the alleged error of the trial court in ruling adversely to alleged rights of petitioner under Section 1 of Article III, of the Oklahoma Constitution; and that the Circuit Court of Appeals affirmed said judgment of the trial court, without in anywise passing upon said State or local question, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of

judicial proceedings as to call for an exercise of this Court's power of supervision.

IV.

It appears that in the trial court ample evidence was introduced to establish a *prima facie* case on behalf of plaintiff, and that in the Circuit Court of Appeals appellant alleged as error the instruction by the trial court of a general verdict for the defendants; and, further, that the Circuit Court of Appeals affirmed said judgment, without in anywise passing upon said alleged error, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V.

ARGUMENT

I.

It appears from the face of said Oklahoma Registration Law, Sec. 5654, O. S. 1931 (Appendix hereto, p. 26), as well as from the operation of said law as disclosed by the record herein, that said law is, in legal and constitutional contemplation, identical with the original grandfather clause; and that the opinion of the Supreme Court of the United States rendered in the case of *Guinn v. United States* (1915), 238 U. S. 347, 59 L. ed. 1340, holding said grandfather clause to be unconstitutional, was apposite to the issue and binding upon the Circuit Court of Appeals; and it appears further that the opinion of said Circuit Court of Appeals for the Tenth Circuit, holding said Oklahoma Registration Statute to be constitutional, wholly ignored said opinion of this Court in said *Guinn* case, and decided an important federal question in a way clearly in conflict with said applicable decision of this Supreme Court of the United States.

It is charged in the petition of plaintiff (R. p. 9) that said Oklahoma Registration Law, Sec. 5654, O. S. 1931, is "an illegal and cunning attempt to achieve the illegal purpose sought by the grandfather clause and to evade the effect of the decision of the Supreme Court of the United States" in *Guinn v. United States*, *supra*. This contention is fully established, both by a careful comparison of said two laws (see them: Appendix, pp. 25, 26), and by consideration of the results they have, respectively, produced. Said grandfather clause purported to establish a universal literacy test, but exempted therefrom the favored class consisting of those (whites) who could vote on January 1, 1866, and their lineal descendants.

Said registration law, S.c. 5654, O. S. 1931, purports to require universal registration as a prerequisite to the right of suffrage, but exempts therefrom the same favored class, the white electors who were favored by the grandfather clause, by continuing to those electors the advantage they enjoyed under the void grandfather law in effect at the time of the 1914 election.

In the opinion in the case of *Guinn v. United States*, *supra*, the grandfather clause was held unconstitutional, not because the State was without power to establish a literacy test, but because of the exemption from the literacy test of those coming within the classification of January 1, 1866.

Similarly, this petitioner has nowhere contended that the mere requirement of universal registration would violate any federal constitutional provision; but said petitioner did, and does, most emphatically insist that it is unconstitutional for the Oklahoma registration statute to require registration of those electors, who, like petitioner Lane, were duly qualified but were prevented by an unconstitutional law from voting at the 1914 election; and at the same time to exempt from registration those who enjoyed an illegal and unconstitutional advantage at said 1914 election.

The opinion of the Circuit Court of Appeals (R. p. 100) states with absolute finality:

"Certainly there is nothing on the face of the registration statute that even tends to support appellant's claim of discrimination between white and negro electors,
* * *

This part of the opinion of the Circuit Court of Appeals is

nothing more than a re-statement of the proposition wholly repudiated by the opinion of Mr. Chief Justice WHITE in the *Guinn* case, *supra*. Said the learned Chief Justice (238 U. S. 347, at p. 360, 59 L. ed. 1340, at p. 1346):

"The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based upon the conditions existing on January 1st, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the 15th Amendment, and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy."

And at page 364 of the U. S. Reporter, page 1348 of the L. ed.:

"It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the 15th Amendment, and makes that period the controlling and dominant test of the right of suffrage."

What difference there may be between the grandfather clause and the registration law is a difference in form and phraseology—none in substance—, the former established a standard based purely upon a period of time before the enactment of the 15th Amendment, and sought to perpetuate conditions prohibited by said Amendment; and the registration law established a standard based upon a period of time (1914) when said Amendment was flagrantly disregarded and violated, and sought to perpetuate said stan-

dard despite the mandate of the Supreme Court in said *Guinn* case, *supra*. The opinion of the Circuit Court of Appeals (R. p. 101) states:

"It may be, and we take it as true, that inasmuch as the so-called grandfather clause in the Constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915, no negroes voted at the 1914 election * * *."

Not only is said registration law of 1916 shown to be, in legal and constitutional contemplation, identical with the grandfather clause, and its administration shown by the record herein to have achieved a similar result, but said opinion of the Circuit Court of Appeals recites in support of said registration law the very reasoning offered in support of the grandfather law itself. In the opinion of the Supreme Court of Oklahoma, purporting to uphold the original grandfather clause, *Atwater v. Hassett et al.* (1910), 27 Okla. 292, at p. 310, this language was employed:

"In *Pope v. Williams et al.*, 193 U. S. 621, 24 Sup. Ct. 573, 48 L. ed. 817, Mr. Justice PECKHAM, in delivering the opinion of the court, said:

"* * * In other words, the privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution.'"

And in the opinion of the Circuit Court of Appeals below (R. p. 100), this language is found:

"In *Pope v. Williams*, 193 U. S. 621, the court said:

"In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exer-

cised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.' "

In said *Atwater-Hassett* opinion, at p. 313 of 27 Okla. Reporter:

"In practically every state of the Union, on January 1, 1866, persons were disqualified from voting who had been convicted of infamous crimes, unless such disqualification had been removed, etc. In addition, an alien residing in this country on January 1, 1866, neither having become a naturalized citizen nor having declared his intention to become a citizen of the United States, was not entitled to vote in any of the states. * * * Such alien residing in the United States on January 1, 1866, neither being entitled to vote in the place of his residence nor under any organized government where he had previously resided or been a citizen of, and his descendants, would also be subject to this educational qualification, coming within the excluded class as of the date of January 1, 1866."

In the opinion of the Circuit Court of Appeals below (R. p. 101):

"Under Section 5654 all who voted at the election in 1914 were placed on the registration books and certificates were issued to them by the registrars without applications therefor. It may be, and we take it as true, that inasmuch as the so-called grandfather clause in the Constitution of Oklahoma had not been declared void as violative of the Fifteenth Amendment until 1915 no negroes voted at the 1914 election, but at least many of them became qualified electors prior to the registration period in 1916, and Section 5652 gave notice that no elector would be permitted to vote at any election unless he should register as provided by the act. *There*

were probably also some whites who were qualified to vote at the 1914 election who did not vote. They were on the same footing as to registration as were the qualified negroes. There was no distinction between them. Any elector, white or negro, who applied and was denied registration, had the same right to carry the issue thus made to the Supreme Court for determination" (Italics ours).

Said *Atwater v. Hassett* opinion was relied upon by the defendants in the *Guinn* case, *supra*, and it was wholly repudiated by the decision therein rendered by this Court. See note to said opinion, 59 L. ed. 1340, at p. 1341. Thus, said opinion of the Circuit Court of Appeals tacitly follows an opinion of a state court, which state court opinion had been wholly repudiated by the decision of this Supreme Court of the United States; and said opinion of the Circuit Court of Appeals fails in anywise to even mention said *Guinn* decision which was directly in point and controlling, and it fails in anywise to observe other decisions of this Court upon the same proposition. See also: *Myers v. Anderson* (1915), 238 U. S. 368, 59 L. ed. 1349.

Said opinion of the Circuit Court of Appeals, R. p. 101, adverts to the case of *Trudeau v. Barnes* (C. C. A. 5, 1933), 65 Fed. (2d) 563. There was involved in said *Trudeau-Barnes* case a provision of the Constitution of Louisiana establishing a universal literacy test, without any attempt at classifying the electors or exempting any class from the requirement. It was quite clearly pointed out by the opinion in said case that said law was,

"essentially different from the Grandfather Clause of the Oklahoma Constitution which was held void in *Guinn v. United States*, * * * and the Maryland statute which was under consideration in *Myers v. Anderson*, * * *."

Said opinion in said *Trudeau-Barnes* case, for the reasons stated, did not have the least bearing upon the constitutional question before the Circuit Court of Appeals in the instant case.

II.

It was charged in the petition of plaintiff, and duly established upon trial, that said registration law of Oklahoma, Section 5654, O. S. 1931, as well as its administration, denied to plaintiff the equal protection of the law, in violation of the Fourteenth Article of Amendment to the Constitution of United States; said Circuit Court of Appeals affirmed the judgment of the trial court, and held said statute to be constitutional, without in anywise passing upon said issue so made under the Fourteenth Amendment, and in so doing, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

It was charged by petition of plaintiff that said registration law, as well as the administration thereof by defendants, denied to plaintiff the equal protection of the laws, contrary to the 14th Amendment (R. p. 3). By proposed instruction No. 3, plaintiff requested the trial court to instruct the jury on the issue raised under the 14th Amendment (R. pp. 53-54); and by the Fourth and Eighth Assignments of Error (R. pp. 80-81), in the Circuit Court of Appeals petitioner assigned as error the refusal of the trial court to give said instructions requested by plaintiff (R. pp. 80-81).

The opinion of the Circuit Court of Appeals did not in anywise even mention said 14th Amendment, or the issues so raised thereunder. The only part of said opinion which by any intendment even remotely related to the equal protection clause of the 14th Amendment, is the following, R. p. 101:

"There were probably also some whites who were qualified to vote at the 1914 election who did not vote. They were on the same footing as to registration as were the qualified negroes. There was no distinction between them. * * *

The fact that a law—either the grandfather clause, or the registration law—may also discriminate against some white persons does not atone for its unconstitutionality as against Negroes. The guaranty of equal protection of the law, as afforded by the 14th Amendment, extends to all persons—white, alien, and Chinese, as well as to Negroes. *Yick Wo v. Hopkins* (1886), 118 U. S. 356, 30 L. ed. 220; *Truax v. Raich* (1915), 239 U. S. 33, 60 L. ed. 131.

Under this proposition, the complaint of petitioner is not that the Circuit Court of Appeals merely erred in disposing of the case, but that said court refused in any manner to pass upon an important federal constitutional question properly before it—that said court, in effect, abdicated and refused to exercise the judicial function, and abrogated petitioner's statutory right of appeal.

III.

It appears that there was properly assigned in the Circuit Court of Appeals the alleged error of the trial court in ruling adversely to alleged rights of petitioner under Section 1 of Article III, of the Oklahoma Constitution; and that the Circuit Court of Appeals affirmed said judgment of the trial court, without in anywise passing upon said State or local question, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

By proposed instruction No. 2, plaintiff requested the trial court to instruct the jury that if plaintiff possessed the qualifications prescribed by Sec. 1, of Article III, of the Oklahoma Constitution (Appendix, p. 25), he was entitled to be registered (R. pp. 52-53); and in the Circuit Court of Appeals, by the 5th and 8th Assignments, petitioner alleged as error the refusal of the trial court to give said requested instruction (R. pp. 80, 81). In affirming the judgment of the trial court, the Circuit Court of Appeals failed in any manner to observe or to rule upon said state question (R. pp. 93-101).

Upon the appeal to said Circuit Court of Appeals, the above-mentioned state question was properly before the court for determination. *Guinn v. United States*, supra (1915), 238 U. S. 347, 59 L. ed. 1340; *Davis v. Wallace* (1922), 257 U. S. 478, 66 L. ed. 325.

Said Oklahoma registration law, Sec. 5654, O. S. 1931, exempting from its requirements those who voted in the illegal election of 1914, and further providing, in effect, that other qualified electors must register within a ten-day pe-

riod, or institute litigation within such period, or be forever disfranchised, was violative of said Secs. 1 and 6, Article III of the Oklahoma Constitution (Sec. 6, Article III, Oklahoma Constitution, is set forth in Appendix, p. 26).

In Cooley's Constitutional Limitations, 8th Edition, 1927, Vol. 2, at p. 1370, the law on this proposition is stated:

"All regulations of the elective franchise, however, must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void." Citing: *Capen v. Foster*, 12 Pick, 485, 23 Am. Dec. 632; *Monroe v. Collins*, 17 Oh. St. 665; *Kineen v. Wells* (Sup. Jud. Ct. of Mass., 1887), 144 Mass. 497, 11 N. E. 916, and other cases.

See, also:

Vol. 9, Ruling Case Law, p. 1036, Secs. 52, 53, 54;
McCafferty v. Guyer et al. (1868), 59 Pa. St. 109;
Monroe et al. v. Collins (1866), 17 Ohio St. 665;
Kineen v. Wells et al. (1887), 144 Mass. 497, 11 N. E. 916.

IV.

It appears that in the trial court ample evidence was introduced to establish a *prima facie* case on behalf of plaintiff, and that in the Circuit Court of Appeals appellant alleged as error the instruction by the trial court of a general verdict for the defendants; and, further, that the Circuit Court of Appeals affirmed said judgment, without in anywise passing upon said alleged error, and in so doing, said Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In the trial court plaintiff saved exceptions to the instruction of a verdict for the defendants (R. pp. 61-62); and in the Circuit Court of Appeals, by the 9th Assigned Error, petitioner assigned as error the trial court's taking the case from the jury and instructing a verdict in favor of defendants (R. p. 81). It appears from the statement of the case herein, *ante*, pp. 1-5, that sufficient evidence was introduced to prove a *prima facie* case on behalf of plaintiff. The Circuit Court of Appeals refused in any manner to pass upon said alleged error, except by the general statement that the trial court's disposition of the case should be affirmed (R. p. 101).

The question before the Circuit Court of Appeals, upon appeal, was whether there was sufficient evidence to submit to the jury, and whether the trial court erred in taking the case from the jury, and not the question of whether there was evidence to support the judgment actually rendered by the court. *Richardson v. City of Boston*, 60 U. S. 263, 15 L. ed. 639. There was a conflict in the evidence as to a conspiracy, particularly as to the alleged statement made by the respondent Marion Parks; there was further conflicting

evidence as to who was registrar in 1916, and whether this petitioner made application to the registrar for registration. The Circuit Court of Appeals seems (R. p. 100), by its opinion, to have undertaken to determine the facts from conflicting evidence,—a function not permitted to the court in a case tried to a jury. As this case has been disposed of, petitioner's right to trial by jury has been fritted away, without so much as a hearing on the questions, not even in the Circuit Court of Appeals. This case seems to deserve an exercise of this Court's power of supervision.

CONCLUSION

Wherefore, it is respectfully submitted that this Petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

I. W. LANE, Petitioner,
By CHARLES A. CHANDLER,
Counsel for Petitioner.

APPENDIX

Section 1 of Article III of Oklahoma Constitution, Vol. 2, O. S. 1931, p. 1406, provides:

"13446. Electors—Qualifications—Felons—Paupers.

"Section 1. The qualified electors of this State shall be citizens of the United States, citizens of the State, including persons of Indian descent, (native of the United States), who are over the age of twenty-one years, and who have resided in the State one year, in the County six months, and in the election precinct thirty days, next preceding the election at which such elector offers to vote. Provided, that no person adjudged guilty of a felony, subject to such exceptions as the Legislature may prescribe, nor any person, kept in a poorhouse at public expense, except Federal, Confederate and Spanish-American ex-soldiers or sailors, nor any person in a public prison, nor any idiot or lunatic, shall be entitled to register and vote."

Section 4a of Article III of Oklahoma Constitution, Vol. 2, O. S. 1931, p. 1407, provides:

"13450. Grandfather Clause.

"Sec. 4a. No person shall be registered as an elector of this State, or be allowed to vote in any election held herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1st, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such Constitution.

"Precinct election inspectors having in charge the

registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officers when electors apply for ballots to vote."

Section 6 of Article III of Oklahoma Constitution, Vol. 2, O. S. 1931, p. 1408, provides:

"13452. Conduct of Elections—Registration.

"Sec. 6. In all elections by the people the vote shall be by ballot and the Legislature shall provide the kind of ticket or ballot to be used and make all such other regulations as may be necessary to detect and punish fraud, and preserve the purity of the ballot; and may, when necessary, provide by law for the registration of electors throughout the State or in any incorporated city or town thereof, and, when it is so provided, no person shall vote at any election unless he shall have registered according to law."

Section 5654, Vol. 1, O. S. 1931, p. 1646, provides:

"5654. Time for Registration—Absentees—Appeals. It shall be the duty of the precinct registrar to register each qualified elector of his election precinct who makes application between the thirtieth day of April, 1916, and the eleventh day of May, 1916, and such person applying shall at the time he applies to register be a qualified elector in such precinct and he shall comply with the provisions of this act, and it shall be the duty of every qualified elector to register within such time; provided, if any elector should be absent from the county of his residence during such period of time, or is prevented by sickness or unavoidable misfortune from registering with the precinct registrar within such time, he may register with such precinct registrar at

any time after the tenth day of May, 1916, up to and including the thirtieth day of June, 1916, but the precinct registrar shall register no person under this provision unless he be satisfied that such person was absent from the county or was prevented from registering by sickness or unavoidable misfortune, as heretofore provided. And provided that it shall be the mandatory duty of every precinct registrar to issue registration certificates to every qualified elector who voted at the general election held in this state on the first Tuesday after the first Monday in November, 1914, without the application of said elector for registration, and, to deliver such certificate to such elector if he is still a qualified elector in such precinct and the failure to so register such elector who voted in such election held in November, 1914, shall not preclude or prevent such elector from voting in any election in this state; and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the clerk of said court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases; and provided further, that the provisions of this act shall not apply to any school district elections. Provided further, that each county election board in this state shall furnish to each precinct election board in the respective counties a list of the voters who voted at the election in November, 1914, and such list shall be conclusive evidence of the right of such person to vote."

Section 31 (Title 8, U. S. Code) provides:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding. (R. S., Section 2004.)"

Section 43 (Title 8, U. S. Code) provides:

"Civil Action for Deprivation of Rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R. S., Section 1979.)"

